

No. 10333

9

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES P. HART, Trustee of International Mining & Milling
Company, a corporation, Debtor and Mount Gaines Min-
ing Company, a corporation, Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY, a
corporation, TITLE INSURANCE AND GUARANTY
COMPANY, a corporation, HUMPHREY ESTATES,
INC., a corporation, HARRY LEE JONES, ARTHUR J.
EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN,
PERSIS E. HAZEN, BYRON HALVERSON and
JOSEPH J. MUELLER,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

FILED

United States
Circuit Court of Appeals

For the Ninth Circuit.

JAMES P. HART, Trustee of International Mining & Milling
Company, a corporation, Debtor and Mount Gaines Min-
ing Company, a corporation, Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY, a
corporation, TITLE INSURANCE AND GUARANTY
COMPANY, a corporation, HUMPHREY ESTATES,
INC., a corporation, HARRY LEE JONES, ARTHUR J.
EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN,
PERSIS E. HAZEN, BYRON HALVERSON and
JOSEPH J. MUELLER,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of Walter C. Clark.....	31
Affidavit of Harry Geballe.....	41
Affidavit of A. V. Salerno.....	33
Affidavit of Wm. H. Smith, Jr.....	39
Amendment to Petition for Order to Show Cause	44
Appeal:	
Certificate of Clerk to Transcript of Record on	55
Designation of Additional Parts of the Record Which Appellees Deem Material on (CCA)	61
Notice of	53
Statement of Points on Which Appellants Intend to Rely on Appeal and Designation of Record (CCA).....	57
Certificate of Clerk to Transcript of Record on Appeal	55
Designation of Additional Parts of the Record Which Appellees Deem Material (CCA)....	61

Index	Page
Minutes of Court—Granting Motions to Dismiss Petition for Order to Show Cause.....	45
Motion of Respondent California Pacific Title & Trust Co. to Dismiss Proceeding.....	37
Exhibit A—Affidavit of Wm. H. Smith, Jr.	39
Exhibit B—Affidavit of Harry Geballe....	41
Motion of Respondent Title Insurance and Guaranty Co. to Dismiss Proceeding, etc....	29
Exhibit A—Affidavit of Walter C. Clark..	31
Exhibit B—Affidavit of A. V. Salerno....	33
Names and Addresses of Attorneys of Record	1
Notice of Appeal.....	53
Opinion and Decision on Motions to Dismiss Petition of Trustee.....	46
Order Granting Motions to Dismiss Petition for Order to Show Cause.....	45
Petition for Order to Show Cause.....	3
Exhibit A—Agreement of Lease and Option, J. W. Humphrey, and Carl W. Yates and J. W. Binns, Dec. 16, 1933.....	19
Exhibit B—Written Notice of Right to Exercise Option, May 25, 1937	25

Index Page

Exhibit C—Written Notice of California Pacific Title & Trust Co. Re- fusing to Comply, June 9, 1937	26
---	----

Statement of Points on Which Appellants In- tend to Rely on Appeal and Designation of Record (CCA)	57
--	----

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

JAMES T. BOYD, ESQ.,

E. C. Lyon Building
Reno, Nevada,

For the Appellant.

STERLING CARR, ESQ.,

One Montgomery Street,
San Francisco, California,

FRANCIS P. WALSH, ESQ.,

One Montgomery Street,
San Francisco, California,

For Respondents and Appellees,
Humphrey Estates, Inc., James S.
Hazen, Persis E. Hazen, Harry Lee
Jones, and Arthur J. Edwards.

Names and Addresses of Attorneys of Record—
(Continued)

MESSRS. LANDELS, WEIGEL
and CROCKER,

275 Bush Street,
San Francisco, California,

MESSRS. STONEY, ROULEAU,
STONEY & PALMER,

130 Montgomery Street,
San Francisco, California,

For Respondents and Appellees,
California Pacific Title & Trust
Company, and Title Insurance and
Guaranty Company

MESSRS. HALVERSON & HALVERSON

611 Financial Center Building,
Los Angeles, California,

For Respondents and Appellees,
Byron Halverson and Joseph J.
Mueller.

D. R. GUSTAVESON, ESQ.,

In Pro. Per.,

1023 Associated Realty Building,
510 West Sixth Street,
Los Angeles, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
For the District of Nevada

No. A-34-A

In the Matter of

INTERNATIONAL MINING & MILLING COM-
PANY, a corporation,

Debtor.

In Proceedings for Reorganization of a Corporation.

No. A-35-A

In the Matter of

MOUNT GAINES MINING COMPANY, a cor-
poration,

Debtor.

In Proceedings for Reorganization of a Corporation.

PETITION FOR ORDER TO SHOW CAUSE

Now Comes James P. Hart, the duly appointed, qualified and acting Trustee of the above named corporations in reorganization under Chapter 10 of the Bankruptcy Act of the United States, and respectfully petitions this Court for an order to show cause directed to the California Pacific Title and Trust Company, the Title Insurance and Guaranty Company, Humphrey Estates, Inc., Harry Lee Jones, Arthur J. Edwards, D. R. Gustaveson, James S. Hazen and Persis E. Hazen, Byron Halverson, and Joseph J. Mueller, why they have failed and

refused to convey to the Mount Gaines Mining Company the title to three-fourths of those certain mining properties mentioned and set forth in the lease and option given by J. W. Humphrey to Carl W. Yates and J. E. Binns on December 16th, 1933, the predecessors in interest of the said California Pacific Title and Trust Company and the Title Insurance and [2] Guaranty Company, and to account for all moneys received by the said California Pacific Title and Trust Company and Title Insurance and Guaranty Company, or either of them, and for the payment to this Trustee of all sums received by either one of said Trustees, California Pacific Title and Trust Company or Title Insurance and Guaranty Company, and their beneficiaries, over and above the amount due for the purchase of the undivided three-fourths interest of said mining claims, and for grounds of such order respectfully shows:

That on the 16th day of December, 1933, J. W. Humphrey, the legal owner of certain mining claims situate in Mariposa County, State of California, made and executed a lease for ten years to said mining claims to Carl W. Yates and J. E. Binns, and at the same time included in said lease to the said Yates and Binns an option to purchase an undivided three-fourths interest in all of said mining claims, said option being as follows:

“Said Owner, for and by the considerations and agreements herein therefore grants unto the lessees an option to purchase an undivided

three-fourth ($\frac{3}{4}$) interest in said mine, property and all appurtenances thereto for the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ($\frac{3}{4}$) interest in said property herein provided to be sold in the event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.” [3]

a copy of which said lease and option is hereto attached and marked “Exhibit A”.

That thereafter, and on or about the 1st day of December, 1934, the said lease and option was as-

signed to the Mount Gaines Mining Company, the above named debtor, and the said Mount Gaines Mining Company thereupon entered into the possession of all of said mining claims under said lease and option, and ever since said time has been, and *no* is, in the sole and exclusive possession of all of said mining claims. That while the said Mount Gaines Mining Company was so in possession of all of said mining claims by virtue of said lease and option, the Superior Court of the State of California, in and for the County of Mariposa, in an action therein pending, entitled:

“J. W. Humphrey, Plaintiff, vs. Mount Gaines Metals, Inc., a corporation, E. W. Grant, A. J. Grant, his wife, A. Hart, May M. Hart, his wife, E. K. Davis, Harry Lee Jones, C. F. Humphrey, First Doe, et al., Defendants”, Case No. 1474, by its Decree duly given and made on February 21, 1936, directed said J. W. Humphrey to convey the legal title to all of said mining claims to the California Pacific Title and Trust Company as Trustee of such legal title, and in trust for W. H. Holcomb, Harry Lee Jones, and C. F. Humphrey, as tenants in common, in the proportions of one-third thereof in each, the said claims being the same mining claims then under lease and option to the Mount Gaines Mining Company. That thereafter the said J. W. Humphrey did so convey the legal title to all of the said mining claims to the California Pacific Title and Trust Company, as trustee.

That on or about the 25th day of May, 1937, the Mount Gaines Mining Company duly and regularly served a written notice upon C. F. Humphrey, W. H. Holcomb, Harry Lee Jones, and the [4] California Pacific Title and Trust Company, trustee, that it exercised the right to purchase the undivided three-fourths interest in said mining claims as set forth in said lease and option, "Exhibit A", and directed the said C. F. Humphrey, Harry Lee Jones, W. H. Holcomb, and California Pacific Title and Trust Company to apply three-fourths of all of the royalty payments theretofore paid by it upon the purchase price of said mining claims. That a copy of said notice is hereunto attached and marked "Exhibit B".

That on the 9th day of June, 1937, the said California Pacific Title and Trust Company, by its notice in writing, refused to comply with the said notice, and refused to apply three-fourths of the said royalties upon the said purchase price, a copy of which said written refusal is hereto attached and marked "Exhibit C".

That at the time said written notice of the exercise of the option was served on C. F. Humphrey, Harry Lee Jones, W. H. Holcomb, and California Pacific Title and Trust Company as trustee, said Mount Gaines Mining Company had paid to J. W. Humphrey and the said California Pacific Title and Trust Company the sum of \$17,418.48 in royalties. That the amount to be applied upon the purchase price on said date was \$13,063.86, of which

\$10,000.00 was to be applied upon the first payment, and the balance applied upon the next payment coming due six months thereafter. That on said 25th day of May, 1937, there was a balance due for the purchase price for said three-fourths interest of \$36,939.14.

That from May 25th, 1937 until August 28th, 1939, the Mount Gaines Mining Company paid the additional sum of \$49,532.89 in royalties to the California Pacific Title and Trust Company, [5] making the total payments of royalties as of said date, August 28th, 1939, the sum of \$66,951.69. That under direction of the notice of May 25th, 1937 to apply three-fourths of all royalties paid in upon the purchase price of an undivided three-fourths interest of the mining claims set out in the lease and option, would have made the amount paid upon the three-fourths interest \$50,213.53, being an overpayment of \$213.53. That since the 28th day of August, 1939, the said Mount Gaines Mining Company became and was the owner of an undivided three-fourths interest in all of the mining claims mentioned in the said lease and option, and that thereafter said California Pacific Title and Trust Company was entitled to receive only twenty-five per cent of the ten per cent mentioned for rents and royalties, to be divided between Humphrey Estates, Inc., Harry Lee Jones, and W. H. Holcomb, or their successors or assigns.

That from August 28th, 1939 to January 12th, 1942, the Mount Gaines Mining Company paid to

the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company the sum of \$46,260.56; that there was only justly and legally due upon the interest then held by the said California Pacific Title and Trust Company and the Title Insurance and Guaranty Company for themselves and the beneficiaries, the sum of \$11,565.14, and that the overpayment amounted to the sum of \$34,795.42, plus the overpayment heretofore mentioned of \$213.53, making the total amount due to the Mount Gaines Mining Company of \$34,908.95. That the sum of \$34,908.95 would make the overpayments to the Humphrey Estates of \$11,636.31, and the interest represented by Harry Lee Jones and assigns the sum of \$11,636.31, and due to the amount returned to the Trustee under and by virtue of the settlement hereinafter mentioned awarding one-half of one-third [6] to the Trustee, would leave the amount of indebtedness of Halverson in the amount of \$2927.02, or a total amount to be returned to this Trustee of \$26,199.64, and that there is now due, owing and unpaid the said sum of \$26,199.64, on account of the overpayments made to the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company for their beneficiaries, and that the same has not been paid nor any part thereof.

That on January 30th, 1939, an action was commenced in the Superior Court of the State of California, in and for the County of Mariposa, by the Mount Gaines Mining Company and the Interna-

tional Mining and Milling Company, debtors herein, against A. G. Ilseng, William H. Holcomb, California Pacific Title & Trust Company, a corporation, First Doe, et al., fictitious defendants, Action No. 1732, seeking a Decree of that Court adjudging the plaintiffs therein to be the owner of an undivided one-third interest in the mining claims leased and optioned to the Mount Gaines Mining Company, and specifically set out in "Exhibit A", and on or about February 25th, 1939, a restraining order and injunction was issued by the said Court directed to the California Pacific Title and Trust Company restraining said California Pacific Title and Trust Company from paying any rents and royalties due or to become due on the one-third interest to William H. Holcomb and the other defendants named in said action, and until the further order of the Court, and that from May 1st, 1939 up until December 1st, 1940, no rents or royalties on the one-third interest were paid, but the same were held in trust by the said California Pacific Title and Trust Company awaiting the final determination of said action.

That while said action was so pending in the said [7] Superior Court of the State of California, in and for the County of Mariposa, and on or about the 12th day of April, 1939, an action was commenced in the United States District Court, for the Southern District of California, Northern Division, by the International Mining and Milling Company, a corporation, and the Mount Gaines Mining Com-

pany, a corporation, plaintiffs, the debtors herein, against A. G. Ilseng, William H. Holcomb, California Pacific Title & Trust Company, a corporation, L. A. McKercher, William Bradish, E. M. Roberts, First Doe, et al., defendants, Action 24 Civil, seeking a Decree of that Court adjudging the plaintiffs therein to be the owner of an undivided one-third interest in the mining claims leased and optioned to the Mount Gaines Mining Company, and specifically set out in "Exhibit A", being the one-third interest mentioned in the Decree of the Superior Court of California in and for the County of Mariposa, No. 1474, held in trust by the California Pacific Title & Trust Company for W. H. Holcomb, and that a restraining order and injunction was issued by said Court restraining the said California Pacific Title and Trust Company from paying any rents and royalties under said lease to the said named defendants, and that said action and said injunction and restraining order remained in full force and effect until November 27th, 1940.

That on May 3rd, 1939, the said action pending in the Superior Court of the State of California, in and for the County of Mariposa, was dismissed by the plaintiffs.

That during said period of time, that is to say, between the 1st day of May, 1939, and November 27th, 1940, while said action was pending in the said United States Court, the sum of \$12,206.58 was impounded and held by the California Pacific Title and Trust Company awaiting the determina-

tion of said action. [8] The remaining two-thirds of the rents and royalties were paid to the Humphrey Estates, Inc., and Harry Lee Jones, and to some of the assigns of the said Harry Lee Jones.

That on the 13th day of November, 1940, this Court, by its order duly given and made, authorized the Trustee to prosecute as Trustee of the above named debtors, and to compromise and settle the action pending in the District Court of the United States for the Southern District of California, Northern Division, the Action No. 24 Civil, pending in said court, and that thereafter, to-wit, on or about the 25th day of November, 1940, the Trustee compromised said named action and entered into an agreement of compromise dated November 25th, 1940, under the terms of which said agreement this Trustee accepted one-half of the one-third interest in said mining claims, and one-half of the moneys impounded, and that on the 27th day of November, 1940, the said United States District Court for the Southern District of California, Northern Division, entered its Judgment and Decree adjudging James P. Hart, the Trustee herein, as Trustee for said Mount Gaines Mining Company, to be the absolute owner of an undivided one-half of the one-third beneficial interest in and to the mining property involved in the said litigation, and that Joseph J. Mueller was decreed to be the absolute owner of an undivided one-fourth of said one-third beneficial interest subject to the lease and option to purchase held by the Mount Gaines Mining Company, and

that Byron Halverson, as successor of William L. Bradish, was decreed to be the owner of an undivided one-fourth of said one-third beneficial interest subject to the lease and option to purchase held by the Mount Gaines Mining Company, and that ever since the said 27th day of November, 1940, the Trustee herein, as Trustee for the Mount Gaines Mining Company, [9] has been the legal owner of one-half of the one-third interest mentioned in said Judgment and Decree, and that said Joseph J. Mueller is the absolute owner of an undivided one-fourth of the one-third interest, subject to the lease and option held by the Mount Gaines Mining Company, and that Byron Halverson, as successor of William L. Bradish, is the absolute owner of an undivided one-fourth of said one-third beneficial interest, subject to the lease and option to purchase held by the Mount Gaines Mining Company. Said Decree further provided that all moneys impounded or held by the California Pacific Title and Trust Company should be divided equally between James P. Hart, as Trustee for the Mount Gaines Mining Company, and Byron Halverson. That under such Decree your Trustee received the sum of \$6103.29, and Byron Halverson received the sum of \$6103.29, on or about the 3rd day of December, 1940.

That on May 1st, 1939, the sum of \$42,977.45 had been paid upon the amount due for the purchase price of the three-fourths interest of the said Mount Gaines Mine, leaving a balance due and unpaid as of that date of \$7022.55. That on the said May 1st,

1939, and thereafter, one-third of all royalties paid were impounded by the said California Pacific Title and Trust Company as hereinbefore set forth. That three-fourths of all royalties so impounded were to be applied upon the purchase price of the three-fourths interest which was held in trust by the California Pacific Title and Trust Company for the defendants named in said Civil Action No. 24, and that the amount that was to be paid for the three-fourths of the said one-third interest was \$2340.85 as of May 1st, 1939. That upon the payment of said sum of \$2340.85, the said Mount Gaines Mining Company became and was the owner of three-fourths of the said one-third interest. [10] That the said one-third interest was further entitled to receive one-twelfth of all royalties paid from May 1, 1939 to December 1, 1940, or a total of \$2750.33, making the total payment due to said one-third interest on December 1, 1940, the sum of \$5091.18. That the said Halverson received the sum of \$6103.29 on December 3, 1940, and said amount was an overpayment of \$1012.11. That from December 3, 1940 to January 12, 1942, said Halverson has received royalties on said one-sixth interest in the sum of \$3829.82, but that he should have received payment on one-twelfth, making an overpayment to him for that period of \$1914.91, or a total overpayment to said Halverson in the sum of \$2927.02.

That since the 28th day of August, 1939, the Trustee has continued to pay ten per cent of the gross receipts for the sale of ores from the mining prop-

erties leased and optioned to it, and that three-fourths of all of said ten per cent payments belongs to the Mount Gaines Mining Company, and that only one-fourth of said payments belongs to the beneficiaries of the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company.

That there is now due and owing to the Mount Gaines Mining Company on account of such overpayments, from the one-third interest herein which was decreed to C. F. Humphrey, or Humphrey Estates, Inc. \$11,636.31, and from the one-third interest decreed to Harry Lee Jones the sum of \$11,636.31, and from the interest now held by Byron Halverson and Joseph J. Mueller, the sum of \$2927.02, and that the same has not been paid nor any part thereof.

That the Mount Gaines Mining Company has been the owner of an undivided three-fourths of all of said mining claims, and has been entitled to receive an undivided three-fourths of all [11] the payments made since August 28th, 1939, except for the payments hereinbefore set forth which have been paid to the petitioner from the interest originally decreed to W. H. Holcomb.

That your petitioner has not full information of all claimants or parties who may have claims as beneficiaries of the two Trustees, and that if there are any such claimants who are not mentioned herein, that they are entitled to be heard herein, and it is the desire of the petitioner to be permitted

to bring in such additional parties as may be interested in the subject matter of this proceeding.

Wherefore, your petitioner prays the judgment and decree of this Court:

1. That the Mount Gaines Mining Company is the owner of an undivided three-fourths of all of the mining claims under the lease and option granted by J. W. Humphrey to Yates and Binns, and assigned to the Mount Gaines Mining Company, as set out in "Exhibit A", and that said Mount Gaines Mining Company was such owner ever since August 28th, 1939.

2. That the Mount Gaines Mining Company is entitled to have returned to it three-fourths of all royalties paid to the California Pacific Title and Trust Company and the Title Insurance and Guaranty Company since August 28th, 1939, except the amounts which have been returned by reason of the settlement had with the representatives and assignees of W. H. Holcomb, said sums to be returned to the Mount Gaines Mining Company being as follows: Humphrey Estates, Inc. \$11,636.31; Harry Lee Jones and his assignees, \$11,636.31; Byron Halverson and Joseph J. Mueller \$2927.02, and that said money be returned and paid to the Mount Gaines Mining Company within a reasonable time to be fixed by the [12] Court, and that said claim for said money be also decreed to be a lien on the one-fourth interest held in trust for said named parties by the California Pacific Title and Trust Company and

the Title Insurance and Guaranty Company. That in the event said money is not paid within the time fixed by this Court, that the said Trustees be directed to sell the said undivided one-fourth interest to the highest and best bidder, and that the said Mount Gaines Mining Company be permitted to be a bidder at such sale; that the said Trustees from the proceeds of said sale pay the said sum of \$26,199.64 to the Mount Gaines Mining Company, and that in the event that the proceeds from said sale are insufficient to pay the amount due the Mount Gaines Mining Company, that this Court direct that a deficiency judgment be docketed against the said named parties in such sum or sums as the Court may direct.

3. That the Court direct the Trustees, California Pacific Title and Trust Company, and Title Insurance and Guaranty Company, to convey the title to an undivided three-fourths of all of the mining claims mentioned in said lease and option to the Mount Gaines Mining Company, and that its title be quieted to such three-fourths interest against all parties making claim or claims for any portion of said undivided three-fourths interest.

4. That your petitioner be directed to continue to pay to the Title Insurance and Guaranty Company the said ten per cent rental and royalties, and that all but one-sixth of said royalties be impounded and held by it as Trustee for the parties to this proceeding, or those legally entitled to the same, until the further order of this Court; that one-sixth

of said royalties so paid be returned to this Trustee on account of the interest heretofore received by the Mount Gaines Mining Company by virtue of the Decree and settlement of November 27th, 1940.

5. That this Court issue its order directed to the [13] said parties named in this petition, and each of them, requiring them and each of them to appear before this Court at a date and at a time to be fixed by this Court, then and there to show cause, if any they have, why the demands and relief prayed for herein should not be granted. That during the pendency of this proceeding, that they and each of them, take no action or proceeding, except with permission of this Court, to interfere with or prevent the operation of the said mining claims by the Trustee appointed by this Court in said proceedings for reorganization, and that said parties be restrained and enjoined from in any manner interfering with the rights of the Mount Gaines Mining Company and your petitioner in the protection and securing the rights of said debtor corporation, Mount Gaines Mining Company.

6. For such other and further orders as may be meet and proper.

Dated at Reno, Nevada this 28th day of February, 1942.

(s) JAMES P. HART

Petitioner.

(s) JAMES T. BOYD

Attorney for Petitioner. [14]

EXHIBIT A

AGREEMENT

This Agreement of lease with option to purchase made in triplicate and entered into this 16th day of December 1933 by and between J. W. Humphrey of San Francisco, California, hereinafter called the "Owner", and Carl W. Yates and J. E. Binns, both of Los Angeles, California, hereinafter called the "Lessees":

Whereas, J. W. Humphrey is the Owner of certain mining properties situate in Mariposa County, California, generally known as the Mount Gaines, and being particularly described in Exhibit A, hereto attached and made a part hereof, and hereinafter called "The Mine";

Said Owner hereby states that certain parties assert claims against the title to said mine property, which claims the Owner denies; and said Owner hereby agrees to use his best endeavors to clear the title of said property; but in the event he fails in said efforts to so clear the title of said property, said Owner shall not be liable to the Lessees for damages in any amount.

Now Therefore, the Owner in consideration of the Lessees fulfilling the covenants and agreements herein contained to be by them kept and performed, does by these presents give and grant unto the Lessees a lease for the period of ten years (10 yrs.) from the date hereof upon said Mine and all appurtenances thereto upon the following terms and

conditions with the right and privilege to mine, extract, mill and remove ores, metals and values therefrom;

To Wit: That within thirty days (30 days) after written notice of clearance of said title, Lessees shall enter upon and have possession of said Mine and all appurtenant thereto, and shall within the next calendar month perform or cause to be performed at least fifty (50) shifts of mine work in rehabilitation of said mine, or exploration, exploitation, development and improvement of said mine as shall be such as is necessary in good mining; and in the second calendar month and each following calendar month thereafter shall perform at least ninety (90) shifts per month:

That all operations of said Lessees herein shall be in accordance with the laws and mine and mill regulations of the State of California:

That said Lessees shall carry on all mining and milling operations so that if it is within reason and mining possibilities, such work shall develop as much ore as is now in sight (developed or exposed) in said mine:

That Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion. Said royalty payments to be considered as a rental only, and all such payments to be made in and through the Security First National Bank of Los Angeles, California. [15]

That all payments shall be made and accompanied by a duplicate copy of such returns, not later than the 25th day of following calendar month; and that upon said 25th day Lessees shall make in writing a full report of all operations, developments, and exposures of moment:

That the Lessees shall pay and discharge when due and when delinquent all taxes hereinafter accruing against the Mine and its improvements and shall do all assessment work as required by law, make the necessary affidavits and record the same at their own expense.

That said Lessees shall use all diligence in the protection and continuity of title of all present existing mining, mineral locations, water and tailing rights and those that may legally accrue under the maintenance and operation of said Mine property at their own expense:

That the Lessees shall post and keep posted legal non-liability notices for said Owner and record a sworn copy of the same in the records of Mariposa County to protect the Owner against any debts for labor, material, or supplies; of debts of said Lessees upon the Mine and that they will hold and save harmless the Owner from any and all loss or damage arising out of any maintenance or operation under this agreement:

That the Lessees further agree that all equipment and improvements shall be then deemed affixed thereto and become a part of said Mine and subject to this lease and option:

That the Lessees shall carry legal compensation insurance on all men by them employed and shall keep complete records of operations, accounts, mining maps and production, which together with all their workings and milling equipment are to be open to full inspection of the Owner at any time:

That should the Lessees fail to keep any of the covenants herein provided, or to carry out any of said covenants contained, then the Owner shall be released therefrom and enter forthwith into possession of said Mine and all property thereon.

It Is Mutually understood and agreed by all the parties hereto, that any failure of the Owner to insist upon a strict compliance of the terms of this agreement by the Lessees shall not constitute or be deemed a waiver of the right of the owner to insist upon such compliance.

It Is Further agreed that any contiguous mining ground that can and may be located and any water or water rights that may be denounced or in any wise acquired for use of operations of said Mine or mill, shall forthwith become the property of said Mine and the Owner thereof and included in this lease and option.

It is further covenanted and agreed that all the herein terms under this agreement are subject to fire, flood, strikes and acts of God.

In consideration of, and the faithful compliance thereto by said Lessees of the foregoing agreement and covenants therein, the said Owner agrees that upon written application of the Lessees to grant

unto said Lessees a further lease upon said Mine, its improvements and acquisitions, an extension of this lease for a further term of ten years under the same covenants, royalties and rights. [16]

Said owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourths ($\frac{3}{4}$) interest in said mine, property and all appurtenances thereof or the sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ($\frac{3}{4}$) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.

It is agreed that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made in the Bank before mentioned herein and that the Owner shall upon notice of such tender of payment deposit in said Bank a good and sufficient deed of conveyance to the Optionees for the three-fourth ($\frac{3}{4}$) interest.

It is mutually understood and agreed by all the parties hereto that both the Owner and Optionee-Lessee shall have the right to assign any or all of their or his rights under this agreement, and that each and all conditions and rights set forth herein shall inure to the benefit of and be binding upon the assigns, heirs and executors of the parties hereto.

Within three months after work is commenced hereunder, the Lessees shall insure buildings and machinery on property in the sum of Five Thousand (\$5000.00). Loss, if any, payable to Owner.

Time is the essence of this agreement.

In Witness whereof, the parties hereunto have affixed their signatures on the day and year first above written.

J. W. HUMPHREY

Owner

CARL W. YATES

J. E. BINNS

Lessees-Optionees [17]

“Exhibit A” of Agreement

This Exhibit excluded as per Section 1 of Prae-
cipe for Transcript of Record. [18]

EXHIBIT B

NOTICE

To C. F. Humphrey, W. H. Holcomb, Harry Lee Jones, and California Pacific Title & Trust Company, Trustee:

Please take notice that the undersigned, Mount Gaines Mining Company, a Corporation, lessee and optionee under that certain agreement of lease with option to purchase, made the 16th day of December, 1933, between J. W. Humphrey, therein called the "owner", and Carl W. Yates and J. E. Binns, therein called the "lessees", all of the rights, title and interest of the lessees therein named having heretofore been assigned to the undersigned Corporation, hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement; further, that the undersigned Corporation has paid to you, the present owners, lessors and optionors of the property described in said above mentioned agreement, and or your predecessors in interest, as royalties falling due thereunder, the full sum of \$13,333.34, three-fourths of which sum may, at the election of the undersigned, be applied toward and upon the purchase price of said property, and that the undersigned does elect that three-fourths of the amount of said royalties, to-wit, the sum of \$10,000, do apply upon said purchase price and do constitute the \$10,000 cash payment required, pursuant to the

terms of the above mentioned agreement, to be paid upon the giving of this notice.

Dated: May 25, 1937.

[Corporate Seal]

MOUNT GAINES MINING
COMPANY

By A. G. ILENG
President

By V. A. HARRIS
Secretary [19]

EXHIBIT C

Letterhead of

CALIFORNIA PACIFIC TITLE & TRUST
COMPANY

148 Montgomery Street
Telephone Sutter 3500
San Francisco

June 9, 1937

Mount Gaines Mining Company,
183 North Martel Avenue,
Hollywood, California.

In Re: Trust No. 1725

Gentlemen:

Referring to your communication dated May 25th, 1937, apparently deposited in the United States Mails May 27th, and purporting to be a no-

tice that you exercise the option to purchase a three-quarters interest in property in Mariposa County, California, known as Mount Gaines Mine, as provided in a certain agreement of lease made December 16th, 1933, between J. W. Humphrey, as Owner, and Carl W. Yates and J. E. Binns, as Lessees, please be advised that, under that certain action numbered 1474 in the Superior Court of the County of Mariposa, wherein J. W. Humphrey was plaintiff and Mt. Gaines Metals, Inc., et al, were defendants, the undersigned was appointed Trustee to hold in trust the property referred to in your notice. Under the provisions of such judgment, the action of the undersigned as such Trustee is to be determined by the united instructions of all the Beneficiaries named therein. The undersigned has not, up to date, received the instructions from all of said Beneficiaries, but in the absence thereof and in order that the failure of the undersigned to reply to your purported election to exercise the option which you claim to have, may not be construed as in any way affecting any of the Beneficiaries of this Trust, or their rights therein, you are advised that the undersigned cannot accept your purported election to exercise your claimed option.

Furthermore, it is claimed by some of the Beneficiaries above referred to that your right to exercise said option has been heretofore lost by your failure to comply with the terms and provisions of said Lease, due notice of which non-compliance has heretofore been given you.

Also, without in any manner waiving the termination of your right to exercise said option, that said purported notice is of no force or effect and does not constitute an election to exercise said purported option for the reason that the sum of Ten Thousand and No/100 (10,000.00) Dollars in cash did not accompany your said notice, the payment thereof as part of the purchase price being specifically provided for under the terms of said Lease.

For the reasons above given, your purported notice to exercise the alleged option is of no force or effect, nor is it binding upon us, nor does said right to exercise said option any longer exist.

Very truly yours,

CALIFORNIA PACIFIC TITLE
& TRUST COMPANY

By (Sgnd.) HARRY GEBALLE

Its Assistant Trust Officer

HG:AG

Registered Mail

Ret. Rec. Req.

[Endorsed]: Filed March 2, 1942. [20]

[Title of District Court and Causes.]

MOTION OF RESPONDENT TITLE INSURANCE AND GUARANTY COMPANY TO DISMISS PROCEEDING AND TO QUASH SERVICE OF PROCESS.

Now comes Title Insurance and Guaranty Company, a corporation, as trustee under the trust referred to in the petition hereinafter mentioned, and, appearing herein specially for the sole purpose of these motions, moves the Honorable above entitled court as follows:

1. To vacate the order of said court made on the 2nd day of March, 1942, in so far as it directs service of a copy of said order and of the petition referred to therein upon this respondent, on the ground that said respondent is a corporation, organized under the laws of the State of California, [24] and was not and is not subject to service of process within the District of Nevada, and on the ground that said respondent has not been served with process in the District of Nevada, all of which appears in the affidavit of Walter C. Clark hereto annexed, marked "Exhibit A", and made a part hereof.

2. To dismiss the petition dated February 28th, 1942, filed in the above entitled proceedings by James P. Hart, petitioner, on March 2nd, 1942, and the proceedings based thereon as to this respondent on the ground that certain court has no jurisdiction in this proceeding to entertain said petition as to

said respondent nor in this proceeding to grant any of the relief prayed for in said petition as against said respondent, and on the ground that said petition fails to state a claim upon which relief can be granted against said respondent in this proceeding, as more clearly appears from the allegations of said petition, the aforesaid affidavit of Walter C. Clark, and the affidavit of A. V. Salerno hereto annexed, marked "Exhibit B" and made a part hereof.

3. To dismiss said petition and the proceedings based thereon on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent.

EDWARD D. LANDELS
LANDELS, WEIGEL
AND CROCKER
STONEY, ROULEAU,
STONEY & PALMER

Attorneys for Respondent

Title Insurance and
Guaranty Company

130 Montgomery Street,
San Francisco, California

[25]

To James T. Boyd
Attorneys for Petitioner,
Suite 217 E. D. Lyon Bldg.,
Reno, Nevada.

Please take notice that the undersigned will bring the foregoing motion on for hearing before the above

entitled court in Carson City, Ormsby County, State of Nevada, on the 6th day of April, 1942, at 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard.

EDWARD D. LANDELS
LANDELS, WEIGEL
& CROCKER

STONEY, ROULEAU,
STONEY & PALMER

Attorneys for Respondent
Title Insurance and Guar-
anty Company,
130 Montgomery Street,
San Francisco, California

Service of a copy of the within motion and of the affidavits therein referred to is hereby admitted this day of April, 1942.

JAMES T. BOYD

Attorney for Petitioner
James P. Hart. [26]

EXHIBIT "A"

[Title of District Court and Causes.]

AFFIDAVIT OF WALTER C. CLARK

State of California,
City and County of San Francisco—ss.

Walter C. Clark, being first duly sworn, deposes and says:

That he is and for many years has been an officer, to-wit, a Vice-President of Title Insurance and Guaranty Company, a corporation;

That said Title Insurance and Guaranty Company was organized as a corporation under the laws of the State of California and ever since the date of its incorporation has been and it now is a corporation organized under the laws of said State of California, and that ever since its incorporation [27] has been and it now is a citizen and resident of said State of California and a non-resident of the State of Nevada;

That said Title Insurance and Guaranty Company has never transacted any business in the said State of Nevada, has never maintained an office in the said State of Nevada and has never maintained or had an agent in the said State of Nevada for the transaction of business;

That on the 6th day of March, 1942, there was delivered to this affiant in the City and County of San Francisco, State of California, a document purporting to be a copy of a petition dated February 28, 1942, by one James P. Hart, as petitioner, filed in the above entitled matter on March 2, 1942, and a document purporting to be a copy of an Order to Show Cause and Temporary Restraining Order issued by the above entitled court on March 2, 1942, directed to said Title Insurance and Guaranty Company and others; that neither the original nor any copy of said petition or of said order to show cause nor any process issuing out of the above entitled court has been served upon affiant nor upon

any other officer or agent of said Title Insurance and Guaranty Company within the said State of Nevada.

That said Title Insurance and Guaranty Company has not consented and does not now consent to the jurisdiction of the above entitled court in the above entitled proceeding to hear or to determine the issues raised in said petition or to grant the relief therein prayed for against said Title Insurance and Guaranty Company or to exercise any jurisdiction of said company in this proceeding.

WALTER C. CLARK

Subscribed and sworn to before me this 2nd day of April, 1942.

[Seal]

EMI EGGERS DEL BONO

Notary Public in and for the
City and County of San
Francisco, State of Cali-
fornia.

My Commission expires December 14, 1942. [28]

EXHIBIT "B"

[Title of District Court and Causes.]

AFFIDAVIT OF A. V. SALERNO

State of California,
City and County of San Francisco—ss.

A. V. Salerno, being first duty sworn, deposes and says:

That prior to the 3rd day of September, 1940, affiant was, ever since has been, and now is Assistant Trust Officer of Title Insurance and Guaranty Company, a corporation, and as such, during all of said time, has had the management of all of those trusts under which said corporation has acted as trustee. [29]

That on February 21st, 1936, the Superior Court of the State of California, in and for the County of Mariposa, in an action entitled "J. W. Humphrey, Plaintiff, vs. Mount Gaines Metals, Inc., a corporation, E. W. Grant, A. J. Grant, his wife, A. Hart, May M. Hart, his wife, E. K. Davis, Harry Lee Jones, C. F. Humphrey, Defendants, No. 1474", made its decree by which J. W. Humphrey was directed to convey the legal title to the mining claims described in a certain lease between J. W. Humphrey as "owner" and Carl W. Yates and J. E. Binns, as "lessees", dated December 16th, 1933, a copy of which is marked Exhibit "A" and is attached to the petition of James P. Hart, dated February 28, 1942, on file in the above entitled matter, to California Pacific Title & Trust Company as trustee for W. H. Holcomb, Harry Lee Jones and C. F. Humphrey.

That thereafter J. W. Humphrey did convey said mining claims to said California Pacific Title & Trust Company as directed by said decree:

That from February 21st, 1936, to September 3rd, 1940, said California Pacific Title & Trust

Company held the title to said mining claims as trustee for J. W. Humphrey, W. H. Holcomb, Harry Lee Jones or their assignees;

That on September 3rd, 1940, said California Pacific Title & Trust Company resigned as trustee under the trust created by said decree of the Superior Court of the State of California, in and for the County of Mariposa, and that on said day its resignation was accepted by said Superior Court and said Title Insurance and Guaranty Company by order of said court dated September 3rd, 1940, was appointed as trustee under the aforesaid trust in the place and stead of said California Pacific Title & Trust Company. [30]

That thereafter and on September 6th, 1940, said California Pacific Title & Trust Company, pursuant to said last mentioned decree, conveyed said mining claims to Title Insurance and Guaranty Company by a deed which was recorded in the office of the County Recorder of Mariposa County, California, in Volume 8 of Official Records, at page 181;

That ever since the said 3rd day of September, 1940, said Title Insurance and Guaranty Company has been and it now is the duly appointed, qualified and acting trustee under the trust created by the final judgment made and entered on or about February 21st, 1936, in the aforesaid action of J. W.

Humphrey, plaintiff, vs. Mount Gaines Metals, Inc., et al, defendants.

A. V. SALERNO

Subscribed and sworn to before me this 2nd day of April, 1942.

[Seal]

EMI EGGERS DEL BONO

Notary Public in and for the
City and County of San
Francisco, State of Cali-
fornia.

My Commission Expires December 14, 1942.

[Endorsed]: Filed April 4, 1942. [31]

[Title of District Court and Causes.]

MOTION OF RESPONDENT TO DISMISS
PROCEEDING AND TO QUASH SERV-
ICE OF PROCESS.

Now comes California Pacific Title & Trust Com-
pany, and appearing solely for the purpose of
these motions, moves the court as follows:

1. To vacate the order of this court made on
March 2, 1942, in so far as it directs service of a
copy thereof and of the petition referred to therein
upon this respondent and to quash the service
thereof upon this respondent on the ground that
this respondent is a corporation, organized under
the laws of California, and was not and is not sub-
ject to service of process [32] within the District
of Nevada, and on the ground that this respondent
has not been properly served with process in this
action nor been served with process in the District
of Nevada, all of which more clearly appears in the
affidavits of Wm. H. Smith, Jr. and Harry Geballe
hereto annexed as Exhibit "A" and Exhibit "B",
respectively.

2. To dismiss the petition dated February 28,
1942, filed in the above proceedings by James P.
Hart, Petitioner, on March 2, 1942, and the pro-
ceedings based thereon as to this respondent on the
ground this court has no jurisdiction in this pro-
ceedings to entertain said petition as to this re-
spondent nor in this proceeding to grant any of the

relief prayed for in said petition as against this respondent, and on the ground that said petition fails to state a claim upon which relief can be granted against this respondent in this proceeding, as more clearly appears from the allegations of said petition and the affidavits of Wm. H. Smith, Jr. and Harry Geballe hereto annexed as Exhibits "A" and "B" respectively.

3. To dismiss said petition and the proceedings based thereon on the ground that said petition fails to state a claim upon which any relief can be granted against this respondent.

EDWARD D. LANDELS
LANDELS, WEIGEL
& CROCKER
STONEY, ROULEAU,
STONEY & PALMER

Attorneys for Respondent
California Pacific Title &
Trust Company
275 Bush Street,
San Francisco, California

To James T. Boyd

Attorneys for Petitioner
Suite 217 E. D. Lyon Bldg.
Reno, Nevada.

Please take notice that the undersigned will bring the above motion on for hearing before this Court in Carson City, Ormsby County, State of Nevada, on the 6th day of April, [33] 1942, at 10 o'clock

A. M., or as soon thereafter as counsel can be heard.

EDWARD D. LANDELS
LANDELS, WEIGEL
& CROCKER
STONEY, ROULEAU,
STONEY & PALMER

Attorneys for Respondent
California Pacific Title &
Trust Company
275 Bush Street,
San Francisco, California

Service of a copy of the within motion and of the affidavits therein referred to admitted this 4th day of April, 1942.

JAMES T. BOYD
Attorney for Petitioner
James P. Hart [34]

EXHIBIT "A"

[Title of District Court and Causes.]

AFFIDAVIT OF WM. H. SMITH, JR.

State of California,
City and County of San Francisco—ss.

Wm. H. Smith, Jr., being first duly sworn, deposes and says:

That he is, and for many years has been, Secretary of the California Pacific Title & Trust Company, a corporation;

That California Pacific Title & Trust Company was organized as a corporation under the laws of California and ever since the date of its incorporation was and now is a corporation organized under the laws of California and that ever since its [35] incorporation was and is now a citizen and resident of California and a non-resident of Nevada;

That California Pacific Title & Trust Company has never transacted any business in the State of Nevada, has never maintained an office in the State of Nevada and has never maintained or had an agent in the State of Nevada for the transaction of business;

That there was delivered to this affiant on March 6, 1942, in the City of San Francisco, State of California, a document purporting to be a copy of a petition dated February 28, 1942, by one James P. Hart, as petitioner, filed in the above entitled matter on March 2, 1942, and a document purporting to be a copy of an Order to Show Cause and Temporary Restraining Order issued by the above entitled court on March 2, 1942, directed to California Pacific Title & Trust Company and others; that neither the original nor any copy of said petition or of said order to show cause nor any process issuing out of the above entitled court has been served upon affiant nor upon any other officer or

agent of California Pacific Title & Trust Company within the State of Nevada;

That California Pacific Title & Trust Company has not and does not now consent to the jurisdiction of the above entitled court in the above entitled proceeding to hear or to determine the issues raised in said petition or to grant the relief therein prayed for against California Pacific Title & Trust Company or to exercise any jurisdiction of said company in this proceeding.

Dated: April 1, 1942.

(illegible presumed to be) WM. H. SMITH

Subscribed and sworn to before me this 1st day of April, 1942.

[Seal]

DOROTHY H. McLENNAN

Notary Public in and for the City and County of San Francisco, State of California. [36]

EXHIBIT "B"

[Title of District Court and Causes.]

AFFIDAVIT OF HARRY GEBALLE

State of California,

City and County of San Francisco—ss.

Harry Geballe, being first duly sworn, deposes and says:

That from before February 21, 1936, to and until

after September 6, 1940, he was assistant Trust Officer of California Pacific Title & Trust Company, and as such, during all of said time, had the management of those trusts under which said company acted as trustee;

That on February 21, 1936, the Superior Court of the State of California, in and for the County of Mariposa, in an [37] action entitled J. W. Humphrey, Plaintiff, vs. Mount Gaines Metals, Inc., a corporation, E. W. Grant, A. J. Grant, his wife, A. Hart, May M. Hart, his wife, E. K. Davis, Harry Lee Jones, C. F. Humphrey, Defendants, made its decree by which J. W. Humphrey was directed to convey the legal title to the mining claims described in a certain lease between J. W. Humphrey as "owner" and Carl W. Yates and J. E. Binns, as "lessees", dated December 16, 1933, a copy of which is marked Exhibit "A" and is attached to the petition of James P. Hart, dated February 28, 1942, on file in the above entitled matter, to California Pacific Title & Trust Company as trustee for W. H. Holcomb, Harry Lee Jones and C. F. Humphrey.

That thereafter J. W. Humphrey did convey said mining claims to California Pacific Title & Trust Company as directed by said decree;

That from February 21, 1936, to September 3, 1940, California Pacific Title & Trust Company held the title to said mining claims as trustee for J. W. Humphrey, W. H. Holcomb, Harry Lee Jones or their assignees;

That on September 3, 1940, California Pacific Title & Trust Company resigned as trustee under the trust created by said decree of the Superior Court of the State of California in and for the County of Mariposa, and that on said day its resignation was accepted by said Superior Court and Title Insurance and Guaranty Company was by said Court appointed trustee thereof in its stead by a decree made by said Court in the aforementioned action on September 3, 1940;

That thereafter and on September 6, 1940, California Pacific Title & Trust Company, pursuant to said decree, conveyed said mining claims to Title Insurance and Guaranty Company by a deed which was recorded in Vol. 8 of Official Records, page 181, of Mariposa County, California; [38]

That since said 6th day of September, 1940, California Pacific Title & Trust Company has had no interest or title in said mining claims whether as trustee or otherwise and does not now have or claim to have any title or right of possession thereto.

Dated: April 1, 1942.

HARRY GEBALLE

Subscribed and sworn to before me this 1st day of April, 1942.

[Seal]

DOROTHY H. McLENNAN

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed April 4, 1942. [39]

[Title of District Court and Causes.]

PROPOSED AMENDMENT

Now Comes the Trustee and in compliance with the order of the Court heretofore made permitting him to propose amendments to the Petition for Order to Show Cause respectfully submits the following amendment to be inserted on Page 3, following the words, "as trustee" appearing on Line 27, page 3, and preceeding the words "that on or about" appearing on Line 28, Page 3:

"That your petitioner is informed and believes and on such information and belief alleges; that subsequent to the entry of the decree in case 1474, and prior to the filing of this petition, the beneficiaries of the said Trust assigned their interest or parts of their interest to various parties [76] and your petitioner is informed and believes that C. F. Humphrey has assigned all of his interest in said Trust to the Humphrey Estates, Inc.; that Harry Lee Jones assigned an interest in his $\frac{1}{3}$ to Arthur J. Edwards, D. R. Gustaveson, James S. Hazen and Persis E. Hazen; that W. H. Holcomb assigned various interests in his $\frac{1}{3}$ but that such $\frac{1}{3}$ interest is now owned by Byron Halverson and Joseph J. Mueller $\frac{1}{2}$ of the said $\frac{1}{3}$ or $\frac{1}{6}$ of the whole and your Trustee is the owner of $\frac{1}{2}$ of the said $\frac{1}{3}$ or $\frac{1}{6}$ of the whole.

That the said above named parties claim an estate or interest in said $\frac{3}{4}$ interest adverse to this

petitioner but all such claim or right is subject to the claims and rights of this petitioner to the said 3/4 interest and that the said named parties have not any estate, right, title, or interest whatever in said 3/4 interest or any part thereof.”

JAMES T. BOYD

Attorney for Trustee

July 2, 1942—Ordered proposed amendment granted.

O. E. B.

Clerk.

[Endorsed]: Filed June 4, 1942. [77]

In the District Court of the United States
in and for the District of Nevada

MINUTES OF COURT

Friday, September 25, 1942

[Title of Causes.]

The petition of J. P. Hart, Trustee, for order to show cause, filed herein March 2nd, 1942, and directed to the California Pacific Title and Trust Company, et al, answers to order to show cause and special appearances and motions to dismiss of respondents, based on jurisdictional and other grounds, having heretofore been heard, submitted on briefs and by the Court taken under advisement, It Is Ordered that the motions to dismiss are granted without prejudice. The Court now files written opinion. [80]

In the District Court of the United States of
America, in and for the District of Nevada

No. A-34-A

In the Matter of

INTERNATIONAL MINING & MILLING
COMPANY, a corporation,

Debtor.

No. A-35-A

In the Matter of

MOUNT GAINES MINING COMPANY, a
corporation,

Debtor.

In Proceedings for Reorganization of a Corporation

OPINION AND DECISION ON MOTIONS TO
DISMISS PETITION OF TRUSTEE RE
MINE OWNERSHIP.

Norcross, District Judge.

The Trustees of above named Debtors filed a Petition for an Order to show cause why the Mount Gaines Mining Company, Debtor, should not be granted "the judgment and decree of this Court:" that said Debtor "is the owner of an undivided three-fourths of all of the mining claims" under a certain lease and option, set out as "Exhibit A" to said Petition, and "was such owner ever since August 28, 1939," and for other incidental matters.

A number of special appearances have been entered and motions to dismiss interposed, based on jurisdictional and other grounds.

The basic question of law upon the hearing of the motions to dismiss presents, primarily, the construction to be placed upon the said lease and option. The following excerpts [81] therefrom will sufficiently present the question:

“This Agreement of lease with option to purchase * * * entered into this 16th day of December, 1933 by and between * * * :

* * *

“Now Therefore, the Owner in consideration of the Lessees fulfilling the covenants and agreements herein contained to be by them kept and performed, does by these presents give and grant unto the Lessees a lease for the period of ten years (10 yrs.) from the date hereof upon said Mine and all appurtenances thereto upon the following terms and conditions with the right and privilege to mine, extract, mill and remove ores, metals and values therefrom:

* * *

“That said Lessees shall carry on all mining and milling operations so that if it is within reason and *ming* possibilities, such work shall develop as much ore as is now in sight (developed or exposed) in said mine:

“That Lessees shall pay as a royalty to the

Owner ten per cent (10%) of all production of and from said mine, from the gross returns of ores shipped and sold, the returns from all recovery of ores milled, concentrates, amalgams, mint returns on bullion. Said royalty payments to be considered as a rental only, and all such payments to be made in and through the Security First National Bank of Los Angeles, California.

“That all payments shall be made and accompanied by a duplicate copy of such returns, not later than the 25th day of following calendar month; and that upon said 25th day Lessees shall make in writing a full report of all operations, developments, and exposures of moment:

* * *

“Inconsideration of, and the faithful compliance thereto by said Lessees of the foregoing agreement and covenants therein, the said Owner agrees that upon written application of the Lessees to grant unto said Lessees a further lease upon said Mine, its improvements and acquisitions, an extension of this lease for a further term of ten years under the same covenants, royalties and rights.

“Said Owner, for and by the considerations and agreements herein therefore grants unto the Lessees an option to purchase an undivided three-fourth ($\frac{3}{4}$) interest in said mine, property and all appurtenances thereto for the

sum of Fifty Thousand Dollars (\$50,000.00) at any time within the period of this lease and or any extension of time thereof; provided this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars (\$10,000.00) to be paid in cash at the time of notice [82] to the first party of the exercising of said option to purchase, and a like sum of Ten Thousand Dollars (\$10,000.00) to be paid on or before the expiration of each and every period of six (6) calendar months thereafter, until said purchase price of Fifty Thousand Dollars (\$50,000.00) shall be fully paid. It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ($\frac{3}{4}$) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned.

“It is agreed that in the event the Lessees exercising the before mentioned option to purchase, the payment shall be made in the Bank before mentioned herein and that the Owner shall upon notice of such tender of payment deposit in said Bank a good and sufficient deed

of conveyance to the Optionees for the three-fourth ($\frac{3}{4}$) interest."

Exhibit "B" of the Petition is a copy of the notice, claiming election to exercise the option to purchase. The material portion thereof reads:

"To C. F. Humphrey, * * * , and California Pacific Title & Trust Company, Trustee:

"Please take notice that the undersigned, * * * , lessee and optionee under that certain agreement of lease with option to purchase, made the 16th day of December, 1933, * * * all the rights, title and interest of the lessees therein named having heretofore been assigned to the undersigned Corporation, hereby elects to exercise, and does exercise, the option to purchase mentioned in said above named agreement; further, that the undersigned Corporation has paid to you, the present owners, lessors and optionors of the property * * * and or your predecessors in interest, as royalties falling due thereunder, the full sum of \$13,333.34, three-fourths of which sum may, at the election of the undersigned, be applied toward and upon the purchase price of said property, and that the undersigned does elect that three-fourths of the amount of said royalties, to-wit, the sum of \$10,000, do apply upon said purchase price and do constitute the \$10,000, cash payment required, pursuant to the terms of

the above mentioned agreement, to be paid upon the giving of this notice.

“Dated: May 25, 1937.

[Seal]

MOUNT GAINES

MINING COMPANY

By A. G. ILSING,

President.” [83]

Exhibit “C” of the Petition, is a copy of the reply of said named Trustee, of date June 9, 1937, to the above claim (Exhibit B) of exercise of option to purchase. The said reply contains the following statement:

“Also, * * * that said purported notice is of no force or effect and does not constitute an election to exercise said purported option for the reason that the sum of Ten Thousand and No/100 (10,000.00) Dollars in cash did not accompany your said notice, the payment thereof as part of the purchase price being specifically provided for under the terms of said lease.
* * * .”

It is clear from a reading of the “agreement of lease with option to purchase” that, if such option is not exercised or until it is exercised to the extent of first payment, the legal relationship of the parties continues only as that of lessor and lessee. Until there is “notice” of exercise of the “option to purchase,” accompanied with “cash” payment, of first installment, it is specifically provided that

the "royalty" payments of "ten per cent (10%) of all production" are "to be considered as rental only." If the option is in part exercised, by the payment of one or more of the installment payments, "as in the agreement of lease with option" provided, then, until final payment is made, "seventy-five per cent (75%) of the royalties and rental payments * * * shall be applied and credited upon the purchase price * * * and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned." The above quoted expression, "royalties and rental payments," clearly refer to the preceding expression — "Lessees shall pay as a royalty to the Owner ten per cent (10%) of all production * * * . Said royalty payments to be considered as rental only, * * * . " After the first installment is "paid in cash," then 75% of the amount of said "royalty payments" are to be credited upon the ensuing purchase price installment payments as they [84] fall due, and not "as rental only."

The express language of the lease and option agreement leaves no basis for an interpretation that the said payments, made prior to election to exercise the option, specifically declared "to be considered as rental only" may, by such mere declaration of exercise of option, be so changed in character that three-fourths of the amount thereof, theretofore paid, ceases to be "rental only," as expressly

designated in the agreement, but the property of the lessee and optionee and applicable, if sufficient in amount, to payment not only of the first installment but that of any or all the others.

The said Debtor, not having tendered a cash payment of the full amount of the first installment of the total option purchase price, at the time of giving written notice of the claimed exercise of such option, such option has not as yet been complied with and the Trustee is not entitled to the relief prayed for in his petition. *James on Option Contracts* Secs. -813-817; 35 C. J. 1038-1042, secs. 181-187.

The motions to dismiss are granted without prejudice.

Dated this 25th day of September, 1942.

/s/ FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed September 25, 1942. [85]

[Title of District Court and Causes.]

NOTICE OF APPEAL

To: California Pacific Title and Trust Company, a corporation, and its attorneys, Landels, Weigel, and Crocker, and Stoney, Rouleau, Stoney and Palmer; Title Insurance and Guaranty Company, a corporation, and its attorneys, Lan-

dels, Weigel, and Crocker, and Stoney, Rouleau, Stoney and Palmer; Humphrey Estates, Inc., a corporation, and its attorneys, Sterling Carr and Francis P. Walsh; Harry Lee Jones and his attorneys, Sterling Carr and Francis P. Walsh; Arthur J. Edwards and his attorneys, Sterling Carr and Francis P. Walsh; D. R. Gustaveson; James S. Hazen and Persis E. Hazen and their attorneys, Sterling Carr and Francis P. Walsh; Byron Halverson and Joseph J. Mueller and their attorneys, Halverson and Halverson;

Please Take Notice that James P. Hart, the duly appointed Trustee of the above named debtors in proceedings for reorganization, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the whole of that certain Order made and entered in this action on the 25th day of September, [86] 1942, dismissing Trustee's petition for order to show cause and denying said petition.

Dated this 20th day of October, 1942.

JAMES T. BOYD

Attorney for Petitioner

James P. Hart.

[Endorsed]: Filed Oct. 20, 1942. [87]

[Title of District Court and Causes.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of the Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the Matters of International Mining and Milling Company, and Mount Gaines Mining Company, Debtors, said matters being Nos. A-34-A and A-35-A, respectively, on the bankruptcy docket of said Court.

I further certify that this transcript, consisting of 96 typewritten pages and numbered from 1 to 96, inclusive, contains a full, true and correct transcript of the proceedings in said matters and of all papers filed therein, as set forth in the Praecipe for Transcript of Record filed herein by James T. Boyd, Esq., attorney for the appellant, and the praecipes for additional portions of the record filed herein by Messrs. Sterling Carr and Francis P. Walsh, and by Messrs. Landels, Weigel & Crocker, and Messrs. Stoney, Rouleau, Stoney & Palmer, attorneys for certain respondents and [95] appellees, all of which praecipes are made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such

Clerk in Carson City, State and District aforesaid.

And I further certify that the cost of preparing and certifying to said record, amounting to \$27.15, has been paid to me by J. P. Hart, Trustee of the above-named Debtors, and appellant herein.

Witness my hand and the seal of said United States District Court this 21st day of December, 1942.

[Seal]

O. E. BENHAM

Clerk, U. S. District Court.

[96]

[Endorsed]: No. 10333. United States Circuit Court of Appeals for the Ninth Circuit. James P. Hart, Trustee of International Mining & Milling Company, a corporation, Debtor and Mount Gaines Mining Company, a corporation, debtor, Appellant, vs. California Pacific Title and Trust Company, a corporation, Title Insurance and Guaranty Company, a corporation, Humphrey Estates, Inc., a corporation, Harry Lee Jones, Arthur J. Edwards, D. R. Gustaveson, James S. Hazen, Persis E. Hazen, Byron Halverson and Joseph J. Mueller, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed December 23, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10333

In the Matter of

JAMES P. HART as Trustee for International
Mining & Milling Company, a corporation, and
Mount Gaines Mining Company, a corporation,
in reorganization,

Appellants,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST
COMPANY, TITLE INSURANCE AND
GUARANTY COMPANY, et als,

Respondents.

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO RELY ON AP-
PEAL AND DESIGNATION OF THE
PARTS OF THE RECORD NECESSARY
FOR THE CONSIDERATION THEREOF.

In compliance with Rule 19 of the above entitled
Court, Appellants here state that the points on
which they intend to rely on the appeal in the
above entitled matter are as follows:

That the question presented was one purely of
law by reason of a motion filed and made by the
respondent, California Pacific Title & Trust Com-
pany, "To dismiss said petition and the proceed-
ings based thereon on the ground that said petition

fails to state a claim upon which any relief can be granted against this respondent." Paragraph 3 of Motion.

The Title Insurance and Guaranty Company and the other respondents made similar motions and joined with the California Pacific Title & Trust Company in presenting said motions.

Appellant relies upon the following points on this appeal and the following designation of the records which he thinks necessary for the consideration thereof.

1. That it affirmatively appears from the petition and the Lease and Option attached thereto that the Mount Gaines Mining Company has, ever since the first day of December, 1934, been, and is now, the owner of the Lease and Option and in the possession of all the mining claims mentioned in said Lease and option.

2. That it is provided in said Lease and Option that the lessee, Mount Gaines Mining Company, while so in possession of said Lease and Option and during the life of said Lease and Option had the right to purchase three-fourths interest in all of said mining claims mentioned in said Lease and Option for the sum of \$50,000.00 and that the said Lease and Option was given for a period of ten years from the 10th day of December, 1933, and that said \$50,000.00 was to be paid as follows: \$10,000.00 at the time of notice to the owners of the exercising of said Option and \$10,000.00 every six

months thereafter until the full sum of \$50,000.00 had been paid. It is also provided in said lease and option, "It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price of the said three-fourth ($\frac{3}{4}$) interest in said property herein provided to be sold in event the second parties exercised said option and purchase said property hereunder, and shall from time to time be credited upon the installment of purchase price next becoming due and payable after the first installment herein mentioned."

3. The said petition affirmatively shows that on the 25th day of May, 1937, the Mount Gaines Mining Company, by notice in writing, notified the owners of the said mining claim that it elected to exercise said Option and directed the said owners to apply three-fourths of the royalties and rentals theretofore paid to the said owners upon the purchase price of said property.

4. That at the time of the notice of the exercise of said Option to said owners the Mount Gaines Mining Company had paid the owners the sum of \$17,418.48 in royalties and rentals and that it was entitled to have three-fourths of that sum, to-wit: the sum of \$13,063.86, applied upon the purchase price of said three-fourths interest of said mining claims.

5. That from the time of the notice of the exercising of said Option, May 25th, 1937, until Au-

gust 28th, 1939, the Mount Gaines Mining Company had paid an additional sum of \$49,532.89 in royalties and rentals to the owners of said property, California Pacific Title and Trust Company, making the total payments of royalties and rentals to said date, August 28th, 1939, \$66,951.69. That three-fourths of said sum, to-wit: the sum of \$50,213.53, the Mount Gaines Mining Company was entitled to have applied upon the purchase price of said three-fourths interest of said mining claims. That by all of said payments herein, to-wit: the sum of \$50,213.53, the said Mount Gaines Mining Company had become the owner and was entitled to a deed for three-fourths of all of the said mining claims.

6. The said petition affirmatively shows that the said owners, to-wit: California Pacific Title & Trust Company and Title Insurance and Guaranty Company, had refused to apply any of the royalties and rentals paid to them upon said purchase price and refused and continues to refuse to make such conveyance.

7. That the Court erred in granting the motion and directing the proceedings to be dismissed.

Appellant designates the following records which he thinks necessary for the consideration of such points.

1. Petition for Order to Show Cause with the Exhibits A, B, and C attached thereto, Page 2 to Page 21 inclusive of cert. record.

2. Amendment to Petition, Page 76 and Page 77 of cert. record.

3. Motion of respondent, California Pacific Title and Trust Company, to dismiss proceedings and to quash service of process, Page 32 to Page 34 both inclusive, of cert. record. This motion is made by all the other respondents on the same ground.

4. Opinion of the Court, Page 81 to Page 85 both inclusive, of cert. record.

5. Minutes of the Court Dismissing Proceedings, Page 80 of cert. record.

Dated this 28th day of December, 1942.

JAMES T. BOYD,

Attorney for Appellants.

217 E. C. Lyon Building,

Reno, Nevada.

[Endorsed]: Filed Dec. 30, 1942.

[Title of Circuit Court of Appeals and Cause.]

**DESIGNATION OF ADDITIONAL PARTS OF
THE RECORD WHICH APPELLEES
DEEM MATERIAL**

Appellees, California Pacific Title & Trust Company and Title Insurance and Guaranty Company, pursuant to Rule 19 of the above entitled Court, hereby designate the following parts of the record which they deem material for a consideration of the appeal herein in addition to those parts of the record designated by appellees, to-wit:

1. Affidavit of W. H. Smith, Jr. and affidavit of Harry Geballe filed in support of motion of respondent below, California Pacific Title & Trust Company to dismiss proceeding and to quash service of process, pages 35 to 39, inclusive, of the certified record.

2. Affidavits of Walter C. Clark and A. V. Salerno filed with the motion of respondent below, Title Insurance and Guaranty Company in support of its motion to dismiss proceedings and to quash service of process, pages 27 to 31, inclusive, of the certified record.

3. Motion of respondent Title Insur. and Guaranty Co. to dismiss proceeding and to quash service of process, p. 24 and 25.

EDWARD D. LANDELS

THOMAS E. PALMER

Attorneys for Appellees,

California Pacific Title &
Trust Company, Title In-
surance and Guaranty Com-
pany.

[Endorsed]: Filed Jan. 9, 1943.